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Supreme Court of the United States

No. 74-1389

October Term, 1974

JAMES AMENT, et al.,
Petitioners,

vs.

DR. ROBERT BROCKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio

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Supreme Court of the United States

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JAMES AMENT, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio

The Petitioners, James Ament, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Appellate Judicial District for the State of Ohio entered on August 7, 1974, affirming the verdict and judgment of the Court of Common Pleas of Mahoning County, Ohio, entered on June 11, 1973, in favor of the Respondent.

OPINIONS BELOW

The Court of Common Pleas for Mahoning County, Ohio, rendered a verdict in favor of the Respondent on June 11, 1973. Thereafter, on August 7, 1974, the Court of Appeals for the Seventh Appellate Judicial District for

the State of Ohio handed down an opinion affirming said verdict and on February 7, 1975, the Supreme Court of the State of Ohio overruled Petitioner's Motion to Certify and dismissed Petitioner's Appeal on the ground that it did not present any substantial Constitutional questions.

JURISDICTION

The order of the Supreme Court of Ohio, in Case Number 74-1006 entitled, James Ament and Rose Ament versus Dr. Robert Brocker, dismissing the appeal from the Court of Appeals of the Seventh Appellate Judicial District of Ohio, was made and entered on February 7, 1975.

The jurisdiction of this court is invoked under 28 U.S.C. section 1257 (3), and Rule 19 (a) of this court.

QUESTIONS PRESENTED

The questions are:

(1) Is one entitled to constitutional due process protections in civil actions as well as criminal actions?

(2) Does the exclusion of relevant, competent evidence which is substantial and credible and which is intended to be used in cross-examination of a key witness, violate a litigant's right to due process under the Fifth Amendment and under the Fourteenth Amendment of the Constitution of the United States?

(3) In a civil action not involving governmental authority, and in the absence of any statutory prohibition, should all competent, substantial, credible and relevant evidence be made available to the court regardless of the source of such evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or in naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I.

Petitioner, James Ament, became a paraplegic following spinal surgery performed by the Respondent. Petitioner's Complaint for damages set forth Respondent's malpractice in the following areas as the cause:

(1) Respondent performed an unnecessary myelogram and discogram procedure upon the Petitioner.

(2) Respondent performed unnecessary spinal surgery upon the Petitioner in the face of a negative myelogram, negative discograms, and minimal clinical signs.

(3) Respondent was negligent in the performance of the surgery itself.

(4) Respondent was negligent in his post-operative and follow-up care of the Petitioner, and was negligent in failing to recognize and treat Petitioner's deteriorating condition.

(5) Respondent failed to warn Petitioner of the potential risks of myelography, discography and spinal surgery.

II.

Petitioners came into possession of a letter (Plaintiff's Exhibit 21) which was given to them by the ex-wife of the Respondent. This letter was written to the Respondent by the Respondent's principal expert witness, Dr. Dohn, a neurosurgeon. The letter strongly admonished the Respondent concerning his surgical procedures and buttressed the Petitioner's contention that it is not

good medical practice to perform spinal surgery in the face of negative myelograms and minimal clinical signs. This was the crux of the case, the fact that unnecessary surgery was performed which led to the Petitioner's paraplegia.

Despite the validity of this evidence, the court summarily ruled that it could not be used for impeachment or for any other purpose.

After ruling that the Petitioner could not use this letter in any manner for cross-examination or any other purpose, the trial court, over the objection of the Petitioner, permitted the author of the letter as Respondent's chief expert to answer the following question:

> "Whether or not there was any wrong done by the Respondent?"

And over objection, the witness was permitted to answer:

> "I see no evidence of any wrong or negligence on the Respondent's part."

Following this damaging testimony and the exclusion of this letter, the jury returned a verdict for the Respondent.

Petitioners appealed to the Court of Appeals for the Seventh Appellate Judicial District for the State of Ohio, assigning six Assignments of Error, which included a claim of error for excluding the letter and a claim of error for permitting the above question and answer. On August 7, 1974, the Seventh District Court of Appeals handed down a fifty-seven page opinion affirming the verdict of the trial court.

STAGE OF PROCEEDING AT WHICH FEDERAL QUESTION WAS RAISED

Petitioners raised the Federal question in the Supreme Court of Ohio by their pleadings in the Memorandum in Support of Jurisdiction which alleged in,

PROPOSITION OF LAW NO. 1:

Due process requirements assuring fundamental fairness of trial must be met in civil actions as well as criminal actions. The exclusion of relevant, competent evidence, which is substantial and credible and intended to be used in cross examination of a key witness, is improper and violates a litigant's right to due process both under the U. S. Constitution and Constitution of the State of Ohio.

ARGUMENT

The right to confront and cross-examine witnesses is a fundamental aspect of procedural due process and is an essential requirement of a fair trial, because of its ability to get at the truth. Cross-examination is the heart of the fact finding process and its effectiveness seriously impaired by excluding trustworthy impeachment evidence of a principal witness.

The Federal question was also raised in their conclusion which stated:

> "Fundamental fairness of trial is a guarantee of the Constitution of the United States Fifth and Fourteenth Amendments, as well as Article One, Paragraph 16 of the Constitution of the State of Ohio.
>
> Fundamental fairness of trial was denied Appellant in this case by the cumulative effect of the trial

court's evidentiary rulings in excluding competent, substantial and credible evidence intended for use in cross-examination of a principal witness; in permitting an incomplete hypothetical question, which lacked critical salient facts in evidence, to be answered by the same principal witness; and in permitting the same principal witness to answer a question requiring a legal conclusion, which was the precise ultimate issue for the jury."

REASONS FOR GRANTING THE WRIT

Fundamental fairness of trial is guaranteed by Due Process protections of the Constitution of the United States. Due process protections assuring a fair trial were denied the Petitioners in this case by the trial court's arbitrary exclusion of competent, substantial and credible evidence, which was intended to be used for impeachment purposes in cross-examination of the Respondent's chief witness.

Fair trial and due process was denied further when the trial court, after excluding use of the letter in any manner, permitted the author of the letter to answer questions which were clearly contrary to his expressed opinions in the excluded letter.

Due process not only requires an opportunity for a hearing, but it requires a FAIR hearing in a meaningful manner.

Confrontation and cross-examination of adverse witnesses is essential to a fair trial—the right to confront and cross-examine adverse witnesses to be meaningful must allow the use of impeachment evidence regardless of its source. This was denied Petitioners by the trial court.

Due process protections under the United States Constitution are not limited to criminal actions but apply equally as well to civil actions.

The property right of a fair trial in a damage action requires application of due process procedural requirements.

This court in a number of instances not involving criminal actions has recognized the validity of applying due process safeguards to protect property rights.

In administrative proceedings, the right to confront and cross-examine adverse witnesses has been held an essential requirement of procedural due process.

Goldberg v. Kelly, 397 U.S. 254, 266-270

Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-104

Greene v. McElroy, et al., 360 U.S. 474, 508

This court has held in administrative proceedings, that public employees are entitled, like all other persons, to the benefit of the Constitutional privilege against self-incrimination.

Uniformed Sanitation Men Assn. Inc. v. Commissioner of Sanitation, 392 U.S. 280

The hearing required by the Due Process Clause must be "meaningful," and appropriate to the nature of the case.

Armstrong v. Manzo, 380 U.S. 545, 552

The court in determining whether constitutional minimums have been honored looks to substance not bare form.

Willner v. Committee on Character & Fitness, 373 U.S. 96, 106-107

A hearing which excludes consideration of an element essential to the decision does not meet the standard of a meaningful hearing appropriate to the nature of the case.

Bell v. Burson, 402 U.S. 535, 541-542

The Constitutional protection of property is not limited to any specific type of property, but rather extends to any significant property interest.

Fuentes v. Shevin, 407 U.S. 67, 86, 89-90

Petitioners were denied a fair trial in accord with traditional and fundamental standards of due process.

The trial court's suppression of available impeachment evidence which went to the heart of the case effectively deprived Petitioners of their right to meaningfully confront and cross-examine the principal adverse witness in the case.

The question of the applicability of due process protections to civil litigation is important because civil litigation and the right to a fair trial is not only a substantial property right, but one area of the law that is actively undergoing change and expanding in scope affecting substantially larger segments of society.

The precise questions raised in this case have been passed upon in lower courts, but have not yet been passed upon by this court.

N. L. R. B. v. South Bay Daily Breeze, 415 F.2d 360 (9th Cir. 1969)

United States v. Winbush, 428 F.2d 357 (6th Cir. 1970)

Drew v. International Bro. of Sulphite & Paper Mill Workers, 37 F. R. D. 446 (D.C. Dist. of Col.)

Munson v. Munson, 166 P.2d 268
Mercer v. Parsons, 112 A. 254
Sackler v. Sackler, 255 N.Y.S.2d 83, 203 N.E.2d 481

A pronouncement by the Supreme Court of the United States is necessary to provide the proper guidelines for the State Courts to follow. It is important that a measure of uniformity and stability be infused into this area of broadly expanding law affecting great numbers of citizens.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Petition for a Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS OF MAHONING COUNTY, OHIO

(Dated August 7, 1974)

Case No. 73 C.A. 45

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

JAMES AMENT and ROSE AMENT,
Plaintiffs-Appellants,

-vs-

DR. ROBERT BROCKER,
Defendant-Appellee.

OPINION

* * * * *

SYLLABUS

1. A failure of a physician to inform a patient of the risk of danger connected with prescribed surgical procedure is sufficient to support a theory of negligence.

2. Generally, after having laid the foundation, contradictory statements of witnesses may be shown for impeachment.

3. Refusal to permit cross-examination of witness in order to lay foundation by asking witness relative to contrary statements at another time and place is erroneous.

4. The contents of a hypothetical question asked an expert witness must fairly reflect those facts properly es-

tablished by the evidence and upon which such witness is prepared to give his opinion, and a hypothetical question which omits a fact that would vitally affect the conclusion of such witness is objectionable.

5. While it is permissible for the trial court to allow counsel in closing argument to read quotations from law reports, the practice manifestly is one which should be guided and restrained by the discretion of the trial judge.

LYNCH, *P. J.*

Plaintiffs, appellants herein, are appealing the verdict and judgment in favor of defendant, appellee herein.

Plaintiff, James Ament has been a paraplegic since September 1970. His complaint is that his physical condition was caused by a negligent lumbar laminectomy operation performed by defendant on plaintiff on October 23, 1969, and by defendant's post-operative care of him.

In September 1969, plaintiff, James Ament developed pain in his low back. He went to a chiropractor three times. The chiropractor prescribed a lumbosacral belt or support for his lower back (R. 480, 500-501, 734-735). He was not getting relief from the pain, and on October 8, 1969, he went to his family doctor, Dr. F. A. Friedrich, who, on examination, found some decrease in the ankle jerk, ordered x-rays. The hospital report stated that there was a slight narrowing of the disc space between L-4 and L-5 and to assess the possibility of discogenic disease suggested that myelography may be of benefit. Dr. Friedrich suspected discogenic disease and referred Mr. Ament to defendant (R. 480-481, 501-504, 744-749, 751, 754-755, D. X. 3).

On October 15, 1969, defendant examined Mr. Ament and found him to be in good physical condition except for

his complaint of pain in his low back. He walked normally on his toes and heels, and had no weakness in the foot muscles. His plantar response was normal. The Laseque test was normal. There was no muscle weakness, spasm or atrophy; no scoliosis or listing of the spine, no bladder or bowel deficiency, and no loss of the lumbar curve (R. 68-72, 75-77, 80-82, 96-97, 482-483, 504-506, 751-752, 906, 915-918). Defendant in his history stated that Mr. Ament complained of pain in the lower back, travelling more to the right side, between the kidney and tailbone to his buttocks for about five weeks duration; that his sleep is disturbed and that coughing, sneezing and Valsalva exaggerate the pain (R. 71, 752). From his neurological examination he found hypesthia (decreased ability to feel touch or pressure) of the S-1 dermatone on the left side, a marked decrease of the Achilles reflex on the right side and tenderness at the L-5 level on the right side. Defendant's impression was that Mr. Ament had a radiculitis and probably had an extrusion of the disc on the right side of the L-5 level. Defendant arranged with the South Side Unit of the Youngstown Hospital Association for Mr. Ament to be admitted and a myelogram and four discograms were taken on October 20, 1969 (R. 83, 94-95, 105-106, 483-485, 506-508, 755-760, 864).

The myelogram was normal and had no surgical significance (R. 93, 128, 145, 864). The hospital records reported that the discograms were normal (R. 95, 112, 129, 140, 145). However, defendant and Dr. Duschesneau testified that the discograms were not normal (R. 95, 632, 864-866). There was substantial pain response at L-3 in administering the discogram (R. 604-609, 821-823, 864-866).

Defendant had Dr. Anthony Pannozzo, a physiatrist, do an electromyograph study on Mr. Ament on October 21, 1969, which indicated that Mr. Ament's pain originated at

the third lumbar (L-3) nerve (R. 486, 508-509, 813-820, 833-835, 867).

On October 23, 1969, defendant performed a laminectomy operation on Mr. Ament at the site of L-3 and found a spondylosis or abnormal bulging of the bone forcing the disc out laterally and compromising the L-3 nerve root. According to defendant, this is why Mr. Ament was having pain going to buttocks (R. 109, 486-487, 509, 857, 863, 870, 921-922).

Mr. Ament was discharged from the hospital on October 27, 1969, which was four days after surgery, and returned to work as an automobile salesman in December 1969. He continued to work until July 1970, when he had to stop because of a developing physical condition. In May, 1970, he noticed a weakness in his legs and had a problem controlling his urine and bowels. Mr. Ament saw defendant on June 15, 1970, and July 10, 1970, and Dr. Friedrich on June 30, 1970, without getting any relief (R. 488-494, 510-515, 763-771, 871-878).

On September 2, 1970, Mr. Ament contacted defendant, who referred him to Dr. Pannozzo for another electromyogram which was done on September 3, 1970. Dr. Pannozzo found that Mr. Ament had completely changed from the year before; that he had no reflexes in both lower extremities; that he had generalized weakness in the lower extremities, and that the nerve connection to the muscles in the lower extremities was disrupted all the way up to above the thoracic ninth level, which is just below the shoulder blades, and was six levels above the site of the operation at L-3. Dr. Pannozzo felt that Mr. Ament had a possible polyneuritis or inflammation of the nerves, and gave a prescription to Mr. Ament on that basis (R. 519-521, 825-829, 856, 878-880).

On September 4, 1970, Mr. Ament was admitted to the South Side Hospital, where defendant examined him and found him to be paraplegic. Upon examination he found that Mr. Ament had motor and sensory deficits to the thoracic 9 level or the seventh thoracic vertebral level; that is, nothing functional below the ninth level. He concluded that Mr. Ament had a transverse myelopathy at the ninth level and ordered another myelogram, which was not of any surgical significance. Myelopathy means spinal cord. A sample of the spinal fluid was taken and tested at the laboratory. None of the tests were abnormal. Defendant did not know the cause of Mr. Ament's condition. He discharged Mr. Ament and referred him to Hillside Hospital in Warren, Ohio, for rehabilitation (R. 521-524, 701-703, 856, 880-890, 900-902).

In February, 1971 Mr. Ament saw Dr. Shenkin, a neurosurgeon in Philadelphia, Pennsylvania, who had him admitted to Episcopal Hospital where some tests, including a myelogram, were made on Mr. Ament (R. 526-528).

Plaintiff's first assignment of error is that the verdict and judgment is against the manifest weight of the evidence.

This trial lasted almost two weeks in which seven days were devoted to the trial of the case, and the jury deliberated three days before arriving at their verdict. The transcript of the proceedings is 1034 pages, and is replete with medical testimony covering several factual questions in this case. It is difficult for any person who is not a medical expert to analyze and summarize such testimony, but we must do so to decide this assignment of error.

Plaintiff's medical expert witnesses testified that Mr. Ament's paraplegic condition is caused by spinal arachnoidi-

tis, which is an inflammation or scarring of the arachnoid membrane because of the presence of a foreign material, such as the dye of a myelogram mixed with blood, or trauma, such as a surgical laminectomy operation. Arachnoiditis either constricts or blocks the flow of spinal fluid and blood vessels. They based this diagnosis on the myelogram taken at the Episcopal Hospital in Philadelphia, Pennsylvania, on February 8, 1971, which showed a blocking of the oil at about the 8th rib area (R. 93, 189-190, 219-220, 251, 279-280, 295, 302, 389-390, 615-616, 708-709, 903-904). They further testified that the cause of Mr. Ament's arachnoiditis based upon a reasonable medical probability was either the myelogram ordered by defendant or the surgery performed by defendant but was probably the surgery (R. 221-227, 239).

There was no evidence of arachnoiditis on the October 20, 1969, myelogram of Mr. Ament (R. 245, 248, 616, 894). There was no evidence that either the October 20, 1969, myelogram or discogram was improperly done (R. 273, 357-358, 431, 617, 629). The September, 1970, myelogram was taken for a limited purpose and no extensive study was made to determine the presence or absence of arachnoiditis. This myelogram did not indicate arachnoiditis (R. 364-370, 616, 618, 728-730, 894).

Defendant's medical expert witnesses testified that the myelogram taken at the Episcopal Hospital on February 8, 1971, had no value in determining the presence or absence of arachnoiditis because of the faulty injection of the pantopaque dye into the subdural space instead of the subarachnoid space or spinal canal. According to those experts, it was necessary to inject the pantopaque into the spinal canal to determine the presence or absence of arachnoiditis, and the needle injecting the pantopaque did not reach the spinal canal and injected the pantopaque

in the subdural space which is between the arachnoid membrane and the dura. Thus, the result is an x-ray showing an irregularity that does not exist in fact (R. 618-626, 687-690, 699-701).

Dr. Dohn testified on cross-examination that he could say with reasonable medical certainty that if Mr. Ament did not have the myelogram, discograms and lumbar laminectomy performed by defendant he would still be in a wheelchair (R. 726).

Defendant admitted that a myelogram has certain potential hazards, including adhesive arachnoiditis, and should not be done without proper indications (R. 83-86, 639). Plaintiff's expert witnesses testified that under the circumstances of this case defendant should not have ordered the myelogram without further conservative treatment (R. 199-208, 379-385).

Defendant's expert witness testified that myelography is an accepted diagnostic aid, that risks associated with myelography are minimal, that such risks had to be evaluated against the diagnostic benefit to be derived from having a myelograph in a specific case, and that the myelograph ordered by defendant on Mr. Ament was an acceptable procedure in this case (R. 130-131, 145, 148, 351, 597-598, 795). Dr. Donald Dohn further testified that in his opinion there is no relationship between Mr. Ament's paraplegic condition and the myelogram or discograms that defendant did to him (R. 727-728).

Everyone, including defendant, admitted that a lumbar laminectomy should not be done without surgical indications (R. 112, 360), and that the operation in this case was an elective type operative procedure rather than an emergency (R. 116).

The testimony of the percentage of the accuracy of myelograms was as follows: Dr. Jannetta—90% (R. 215); Dr. Duschesneau—95% through L-3, 90% at L-4 and 85% at L-5 (R. 636); and Dr. Dohn—80% (R. 721). However, there still may be a ruptured disc even though the myelogram appears normal (R. 142, 721).

Defendant admitted that the incision for his laminectomy operation of Mr. Ament was about an inch (R. 113). Dr. Jannetta, a neurosurgeon from Pittsburgh, Pennsylvania, testified that for a lumbar laminectomy operation a one inch lateral incision would not provide sufficient visualization to perform such an operation, and that he makes a three to four inch incision for such an operation (R. 213-214).

Plaintiff's expert witnesses testified that under the circumstances of this case it was not good medical and surgical practice to perform a lumbar laminectomy on Mr. Ament (R. 208-211, 385-392, 446).

Defendant testified that he has performed approximately four thousand laminectomies; that the operation at issue in this case was a routine surgical procedure; that there was no evidence of arachnoiditis either on the x-rays taken at the South Side Hospital or at the Episcopal Hospital in Philadelphia; and that the motor and sensory tests indicated that Mr. Ament's paraplegic trouble originated at the thoracic 9 level, which is too remote from the L-3 site of the operation to have been caused by the operation at issue (R. 856, 870, 894, 908-911).

Dr. Pannozzo testified that his examination showed that Mr. Ament had enough of a problem that he should have surgery (R. 821).

Dr. Dohn testified upon review of the records in this case and upon consideration of the facts of this case based

upon reasonable medical certainty defendant performed his care and services as a neurosurgeon in this case in a fashion that would be acceptable to the practice of neurosurgery in Cleveland or in Youngstown; that he saw no evidence of any wrong or negligence on defendant's part; and that he knew of no evidence of any trauma that may have occurred to either the pia or arachnoid during the surgery of Mr. Ament (R. 672-687, 727).

Mr. Ament testified that prior to his operation defendant did not tell him of any danger associated with any of the procedures that defendant planned to do on him but told him that it was like an appendicitis operation, and that there was nothing to it (R. 484). Defendant testified that when Dr. Ament asked him whether the operation was dangerous or not, he told him that he did not anticipate any difficulty unless some act of God intervened. He felt that potential hazards were remote and that it was inadvisable to upset Mr. Ament by telling him the potential of paralysis. Therefore, he did not tell Mr. Ament that a lumbar laminectomy might cause paralysis (R. 87-88, 868-870).

Defendant testified that the operation at issue in this case was a routine surgical procedure; that there was nothing unusual about it, and that Mr. Ament had a good recovery (R. 870-873). There was no evidence that defendant was negligent in the performance of the operation (R. 240).

Dr. Green, plaintiff's expert witness, agreed that the laminectomy performed in this case is no more dangerous than an appendectomy (R. 406).

In *Belcher v. Carter*, 13 Ohio App. 2d 113, the court held that a failure of a physician to inform a patient of the risk of danger connected with prescribed radiation

treatment is sufficient to support a theory of either negligence or battery.

The trial court gave the following pertinent charge to the jury:

> "You are instructed as a matter of law that there are three main elements of a valid patient consent: First, that the physician must disclose the material risks of a treatment whether the patient asked for them, or not; two, the law, not prevailing medical practice, governs what risks must be disclosed; the test for determining whether a particular peril must be divulged is its materiality to the patient's decision; three, such disclosure can not be avoided simply because it may have frightened the patient into balking, or into refusing surgery." (R. 981-982, 1015).

One of the determinative factual questions in this case is whether defendant's surgical tests and operation proximately caused Mr. Ament's paraplegic condition. The jury's verdict indicates that they found that there was no connection between such operation and Mr. Ament's present condition. We find that the question of the effect of defendant's failure to notify Mr. Ament of potential risks of paralysis because of the operation at issue was a matter for the jury.

In this case the parties on both sides were represented by experienced, competent counsel who ably represented their respective clients by introducing the pertinent and relevant evidence in support of the positions of their clients. There were several factual questions at issue in this case, and the evidence was in conflict on all factual questions. The natural sympathies of the jury would have been for Mr. Ament. Their verdict indicates that their decision was based on the facts of this case rather than their sympathies.

We hold that the trial court properly presented these factual questions to the jury, and that the verdict and judgment is supported by the evidence in this case. Therefore, we overrule plaintiff's first assignment of error.

Plaintiffs' second assignment of error is that the trial court committed prejudicial error when it suppressed documentary evidence intended to be used for impeachment purposes.

This assignment of error concerns PX-21 which is in the record but which was not introduced into evidence because the trial court, in effect, sustained a motion of defendant to suppress this evidence.

PX-21 is a letter dated December 15, 1971, from Dr. Donald F. Dohn, head of the Department of Neurological Surgery of the Cleveland Clinic, to defendant concerning a patient who is not a party to this lawsuit.

Prior to the ruling by the trial court on this assignment of error, defendant, on cross-examination, admitted that he was not Board certified either as a general surgeon, a neurologist or a neurosurgeon; that he had unsuccessfully taken Board examinations three times, and that he had received a letter in 1968 from the American Board of Neurological Surgery that he was weak in all subjects (R. 65-68). The trial court refused to admit the letter from the American Board of Neurological Surgery to defendant (P. X. 5) into evidence (R. 538), and plaintiffs subsequently withdrew P. X. 5 as an exhibit (R. 544, 572). Defendant requested that P. X. 5 be made a part of the record of the case even though it was withdrawn as evidence (R. 571-572).

The record indicates that defendant was divorced, and that his ex-wife had removed from his files P. X. 5 and P. X. 21 and had turned them over to plaintiffs' counsel (R. 67, 538, 565).

At the end of plaintiffs' case, defendant's attorney ascertained that plaintiffs' attorney had P. X. 21 in his possession and intended to use it for cross-examination of Dr. Dohn in the event that Dr. Dohn's testimony would be contrary to what he had expressed in P. X. 21 for the purpose of testing Dr. Dohn's bias and veracity. Defendant's attorney made a motion to suppress P. X. 21 and asked that in the event that plaintiffs' attorney attempted to use it in any way the trial court should consider it to be of such prejudicial nature that a mistrial be declared and a juror withdrawn (R. 565-570).

In response to this motion, the trial court stated as follows:

> ". . . the Court, in consideration of the correspondence of which the evidence consists, does not treat the question of whether or not under ordinary circumstances such evidence would be competent in the cross-examination of a witness in this matter. The Court, in consideration here, is treating this in the same fashion as a motion to suppress made under a different classification of cases, and finds that the use and reference to the same in the presence of the jury and within their hearing as to its contents would be—as was in the Court's opinion Exhibit 5—highly prejudicial to the rights of this defendant, principally because of the manner in which the same came into the hands of the party. I think that's all." (R. 570-571).

Previously, the trial court had threatened to turn the matter over to the bar association (R. 566).

The testimony that defendant had received a letter in 1968 from the American Board of Neurological Surgery (P.X. 5) was introduced into evidence without objection (R. 66-68).

A motion to suppress evidence is generally associated with criminal cases and involves constitutional and statutory rights that are not at issue in this case. We do not condone the manner by which either P.X. 5 or P.X. 21 got into the hands of plaintiffs' counsel, but nothing has come to our attention that would prohibit the use of information contained in such exhibits in a civil case, if otherwise admissible, relevant and pertinent, because of the manner in which such exhibits got into the hands of plaintiffs' counsel.

We hold that P.X. 21 could not be introduced as an exhibit in this case, because it contains information about a patient who is not a party to this lawsuit. Therefore, it is a privileged communication pursuant to R. C. 2317.02 (A), and neither P.X. 21 nor the information concerning the specific patient which is the subject of the letter could be used in this case without the express permission of such patient.

However, this letter contained the following general observations as to defendant's operations on his patients:

> "* * * I am concerned about your indications for surgery, * * * for patients in general. As you know, we have been seeing a number of your patients in consultation, some of whom have been referred by you, others having been self-referred or referred by other physicians. * * *.
>
> "I have seen a number of patients whom you operated in face of a normal myelogram and normal discogram. As I have mentioned to you before, my interpretation of the problem is further clouded by having a copy of your operative notes in which you fail to describe your operative findings. Frankly, no matter how neatly you may do your surgery, I do not

consider it good practice to operate without proper indications.

"I would like very much to discuss this aspect of your practice with you since I think we all owe the public assurance of their receiving the highest grade of neurosurgical care. I have discussed this with Dr. Collis and Dr. Gildenberg, since both of them have independently formed similar opinions concerning your surgical indications."

We hold that the above part of this letter does not refer specifically to the patient named in the letter and is not barred by R. C. 2317.02 (A).

The general rule is that, having laid the foundation, contradictory statements of witnesses may be shown for the purpose of impeachment. The refusal to permit cross-examination of a witness for the purpose of laying a foundation for impeachment by asking the witness relative to contrary statements at another time and place is erroneous. *Simpson v. Newinger,* 28 Ohio App. 133.

In the instant case Dr. Dohn's testimony was directed towards the standard of defendant's care and services as a neurosurgeon with reference to his patient, Mr. Ament, and he made no statement as to defendant's general competency. Thus, we question whether Dr. Dohn's testimony in this case was contradictory to his statements in P.X. 21.

Moreover, plaintiffs' attorney made no attempt to question Dr. Dohn on cross-examination as to the general observations of Dr. Dohn in P.X. 21. He contends that he was concerned about the risk of having the trial judge declare a mistrial because of the use of any of the information contained in P.X. 21. However, plaintiffs' attorney

could have requested a conference in the trial court's chambers and informed the trial judge as to what information in P.X. 21 he intended to use in cross-examination of Dr. Dohn so that the trial court would have had the opportunity to pass on the specific use of information contained in P.X. 21 rather than the general use that was more or less the subject of the discussion at the close of plaintiffs' case.

Under the circumstances of this case, we find that plaintiffs have not demonstrated error on the part of the trial judge with reference to this assignment of error. Therefore, we overrule plaintiffs' second assignment of error.

Plaintiffs' third assignment of error is that the trial court erred when it permitted an expert witness of the defendant, over objection, to answer on redirect examination, the following question:

> "Is there anything further that you feel you might add, or that Mr. Goldberg did not ask you?" (R. 643).

We feel that this question was improper because it was indefinite and that plaintiffs' objection should have been sustained; however, under the circumstances of this case the answers of the witness was not prejudicial to plaintiffs (R. 643-644). Therefore, we overrule plaintiffs' third assignment of error.

Plaintiffs' fourth assignment of error is that the trial court erred when it permitted defendant's expert, Dr. Donald Dohn, to be asked, over objection a hypothetical question which did not include certain facts which plaintiffs' consider critical and salient.

The hypothetical question covers fourteen pages from R. 672 to 685, of which five pages were preliminary ques-

tions and nine pages contained the hypothetical question. During the preliminary questions, Dr. Dohn testified that he had reviewed copies of the Youngstown Hospital Association records of admission of Mr. Ament in October 1969 and September 1970, of defendant's office records and of the x-rays of Mr. Ament taken at the Youngstown Hospital Association on the two occasions that Mr. Ament was there and was aware of the history of the case (R. 672-676). We find that it was unnecessary for Dr. Dohn to be told that there was no loss of the lumbar curve, no scoliosis or listing of the spine, or that the myelogram and discogram was normal, because Dr. Dohn was qualified to interpret the x-rays taken in this case and did not have to rely on the interpretations of other people of these x-rays. The report of the hospital resident's physical examination prior to surgery showing no motor and neurological impairment and no pathological reflexes was in the record of Youngstown Hospital Association (P.X. 1) that Dr. Dohn reviewed; therefore, we find that it was unnecessary to specifically mention this fact in the hypothetical question. The nurses' notes that plaintiff was up and walking about with no complaints of pain prior to surgery were also in the record of the Youngstown Hospital Association which Dr. Dohn reviewed (R. 118, 120, 784, 786).

Plaintiffs contend that the following facts should have been included in the hypothetical question of Dr. Dohn: Mr. Ament's gait was normal and had no weakness in the foot muscles. His plantar response was normal. The Laseque test was normal. There was no muscle weakness, atrophy or spasm, and no bladder or bowel deficiency.

Defendant and Dr. Friedrich testified that these signs may or may not exist as a sign of a herniated or ruptured disc (R. 76, 805).

Dr. Jannetta, plaintiffs' expert witness, testified that the plantar reflex test is not positive in the lumbar area where Mr. Ament's operation took place (R. 192). Dr. Green testified that a normal plantar reflex is usually not significant to test disc trouble (R. 378).

Dr. Green, plaintiffs' expert witness also, testified that the absence of weakness in the foot muscles is not always significant to test disc trouble; that the presence or absence of muscle spasm is non-specific as a sign; and that a bladder deficiency or bowel deficiency has localizing value. He further testified muscle weakness in the legs and muscle atrophy may be found with ruptured discs, and that normal gait and Laseque test were significant (R. 377-379).

On cross-examination, Dr. Dohn was questioned as to the facts left out of the hypothetical question without changing his opinion (R. 713-718).

The contents of a hypothetical question asked an expert witness must fairly reflect those facts properly established by the evidence and upon which such witness is prepared to give his opinion, and a hypothetical question which omits a fact that would vitally affect the conclusion of such witness is objectionable. *Surman v. Ohio & Pennsylvania Oil & Gasoline Co.*, 116 Ohio App. 453, m.c.o. Dec. 5, 1962; 21 *Ohio Jurisprudence*, 2d 441, Evidence, Section 430.

The second paragraph of the syllabus of *Giles v. Yellow Cab Co.*, 1 Ohio App. 2d 404, is as follows:

> "The omission from a hypothetical question addressed to an expert witness of a fact which, although in evidence in the case, is of little or no consequence, does not constitute prejudicial error."

The seventh headnote of *Dickerson v. Shepard Warner Electric Co.*, 287 F. 2d 255, 15 Ohio Opinions 2d 479, is as follows:

> "Although a hypothetical question need not contain all the testimony presented and a party may include only facts which support his theory, the form and the length of such a question are matters generally for the discretion of the trial judge."

Our impression from reading the hypothetical question asked Dr. Dohn is that defendant's attorney attempted to include all the essential facts in his question. Plaintiffs correctly point out that some facts were omitted. The determinative question is whether such omitted facts would have vitally affected the conclusion of Dr. Dohn. The evidence in this case indicates that they would not have affected his opinion. Therefore, we hold that the trial court did not commit error in permitting Dr. Dohn to answer the hypothetical question at issue in this assignment of error, and that if the trial court had committed error it was not prejudicial to plaintiffs under the circumstances of this case. If the trial court erred in its ruling on this hypothetical question, it likewise erred in overruling the objections of defendant to the hypothetical questions asked by plaintiffs' counsel to his medical experts.

We overrule plaintiffs' fourth assignment of error.

Plaintiffs' fifth assignment of error is that the trial court committed error when it overruled their objection to the following question directed to defendant's expert witness, Dr. Dohn, and the answer thereto:

> "Q. Do you have any opinion whatever, sir, based on reasonable medical certainty as to whether or not there was any wrong done by Dr. Brocker? * * *

"A. Yes.

"Q. And what is that opinion?

"A. I see no evidence of any wrong or negligence on Dr. Brocker's part.

"Mr. Goldberg: I move the answer be stricken.

"The Court: Overruled." (R. 686-687).

The first and third paragraphs of the syllabus of *McKay Machine Co. v. Rodman,* 11 Ohio St. 2d 77, are as follows:

> "1. In all proceedings involving matters of a scientific, mechanical, professional or other like nature, requiring special study, experience or observation not within the common knowledge of laymen, expert opinion testimony is admissible to aid the court or the jury in arriving at a correct determination of the litigated issue.
>
> "3. Expert opinion testimony is admissible as to an ultimate fact without infringing the function of the jury, if the determination of such ultimate fact requires the application of expert knowledge not within the common knowledge of the jury.
>
> Followed in *Huffman v. Stone,* 26 Ohio St. 2d 159.

We hold that the trial court did not err in overruling plaintiff's objection to the question at issue asked of Dr. Dohn. However, there was a conflict in testimony as to whether or not it was necessary for either the myelograms, discograms or lumbar laminectomy to have been performed on Mr. Ament. Therefore, we hold that the part of Dr. Dohn's answer as to "negligence" was improper and could have been stricken by a proper motion. However, plaintiffs' motion was directed to the entire answer,

and we feel that part of the answer was competent and admissible.

A motion should be directed to the particular evidence considered objectionable and should specify the grounds upon which it is based. 52 *Ohio Jurisprudence* 2d, 574, Trial, Section 87; 53 *American Jurisprudence* 132, Trial, Section 147; 21 *Ohio Jurisprudence* 2d 199, Evidence, Section 187.

Under the circumstances of this case we hold that whatever error, if any, was committed under this assignment of error was either waived by plaintiffs or was not prejudicial to them. Therefore, we overrule plaintiffs' fifth assignment of error.

Plaintiffs' sixth assignment of error is that the trial court committed error by permitting defendant's counsel in his closing argument, over objection, to read law to the jury from a case involving different facts and questions. Set out below is the part of the closing argument of defendant's counsel to which plaintiffs take exception:

> "There is some law that I believe the court will give you later as to the duty of a doctor in this situation. * * * I think the instructions may well go something like this: Ladies and Gentlemen of the Jury, I instruct you that it is the law that a physician does not warrant that his care and treatment of a patient will be successful, or undertake that nothing serious will arise as a result thereof; rather, his duty is to exercise that degree of care and skill which is ordinarily applied by members of the medical profession in the same line of practice in his own or similar community. In this case Dr. Brocker did not promise or warrant that his care and treatment of Mr.

Ament would be successful. Nor did he undertake that nothing serious would arise as a result thereof. Rather his duty, Dr. Brocker's duty, was to exercise that degree of care and skill which is ordinarily employed by members of the medical profession in the same line of practice in his own or similar—

"Mr. Goldberg: Objection. I'm sorry, I had to object, but I don't think it's proper for him to be reading to the jury, I think the law should come from the Court.

"The Court: I do think however that his introduction was sufficient to take care of it, so, go ahead.

"Mr. Wilkes: Thank you. Ladies and Gentlemen, I have already told you that the law comes from the Court, but you know as a lawyer in addition to finding out what the facts are I must have some knowledge of what the law is, and I am at this point telling you what I think the law is, and what I think Judge Jenkins will say to you the law is with respect to certain aspects of this case. * * *." (R. 949-591).

The trial court included substantially all the above mentioned law in his charge to the jury without objection from plaintiffs (R. 980-981, 1018).

In *Timberman v. State,* 107 Ohio St. 261, the court stated on page 266 as follows:

"While it is not error to allow quotations from law reports to be read in argument, the practice manifestly is one which should be guided and restrained by the discretion of the trial court."

See 53 *Ohio Jurisprudence* 2d 182, Trial, Section 269.

We hold that the trial court did not commit error under the facts of this assignment of error. Therefore, we overrule plaintiffs' sixth assignment of error.

Judgment affirmed.

Donofrio, *J.*,
O'Neill, *J.*,

APPROVED:

/s/ JOHN J. LYNCH
Presiding Judge

ORDERS OF THE SUPREME COURT OF OHIO

(Filed February 7, 1975)

No. 74-1006

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

JAMES AMENT *et al.*,
Appellants,

vs.

ROBERT BROCKER,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR MAHONING COUNTY

This cause, here on appeal as of right from the Court of Appeals for Mahoning County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

* * * * *

(Caption as above)

MOTION FOR AN ORDER DIRECTING THE COURT
OF APPEALS FOR MAHONING COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

PORTIONS OF MEMORANDUM IN SUPPORT OF JURISDICTION RAISING THE FEDERAL QUESTION IN THE SUPREME COURT OF OHIO

PROPOSITION OF LAW NO. 1.

Due process requirements assuring fundamental fairness of trial must be met in civil actions as well as criminal actions. The exclusion of relevant, competent evidence, which is substantial and credible and intended to be used in cross examination of a key witness, is improper and violates a litigant's right to due process both under the U. S. Constitution and Constitution of the State of Ohio.

ARGUMENT

The right to confront and cross-examine witnesses is a fundamental aspect of procedural due process and is an essential requirement of a fair trial, because of its ability to get at the truth. Cross-examination is the heart of the fact finding process and its effectiveness seriously impaired by excluding trust worthy impeachment evidence of a principal witness.

Wilner v. Committee on Character & Fitness, 373 U.S. 96, 103, 104;

Chambers v. Mississippi, 410 U.S. 284, 294, 295;

Simpson v. Simpson, 19 Ohio App. 2d 167.

Constitutional due process requirements are not limited to criminal proceedings but are also required in civil proceedings.

Goldberg v. Kelly, 397 U.S. 254, 269, 270;

Fuentes v. Shevin, 407 U.S. 67;

Bell v. Burson, 402 U.S. 535;

Armstrong v. Manzo, 380 U.S. 545.

The specific constitutional provisions involved in this case are:

Constitution of the United States, Amendment 5;

Constitution of the United States, Amendment 14, Section 1;

Constitution of the State of Ohio, Article 1, Paragraph 16.

PROPOSITION OF LAW NO. 2.

In a civil action not involving governmental authority, where there is no statutory prohibition, all competent, substantial, credible and relevant evidence should be made available to the courts, regardless of the source of such evidence.

ARGUMENT

The principal function of a trial is to arrive at the truth, and the source of competent, credible evidence should not be of the concern to the court where evidence offered is substantial, credible, relevant and competent and does not involve criminal sanctions or activities of governmental agents.

Sackler v. Sackler, 255 N.Y. 2d 83, 203 N.E. 2d 481;

Munson v. Munson, 27 Cal. 2d 659, 166 P. 2d 268;

Mercer v. Parsons, 95 N.J.L. 224, 112 A. 254;

N.L.R.B. v. South Bay Daily Breeze, 415 F.2d 360 (CA-9, 1969);

Drew v. International Bro. of Sulphite & Paper Mill Workers, 37 F.R.D. 446;

United States v. Winbush, 428 F.2d 357 (CA-6, 1970).

LETTER OF DONALD F. DOHN, M.D.

CLEVELAND CLINIC
Cleveland, Ohio 44106

December 15, 1971

Robert J. Brocker, M.D.
932 Belmont Avenue
Youngstown, Ohio

Re: Mrs. Norma Rubeor
Clinic No.: 1-218-934

Dear Dr. Brocker:

I am enclosing a copy of my report in the case of Mrs. Norma Rubeor. I am sending this to you with this special note, because I am concerned about your indications for surgery, not only for this particular patient, but for patients in general. As you know, we have been seeing a number of your patients in consultation, some of whom have been referred by you, others having been self-referred or referred by other physicians.

In this particular patient you carried out an anterior interbody fusion in an attempt to relieve rather a typical pain of 20 year standing, in face of what appears to me to be normal preoperative plain x-rays, a normal myelogram and a non-descript cervical discogram. It is not surprising to me that she is not relieved of her symptoms and still seeking help.

I have seen a number of patients whom you operated in face of a normal myelogram and normal discogram. As I have mentioned to you before, my interpretation of the problem is further clouded by having a copy of your operative notes in which you fail to describe your operative findings. Frankly, no matter how neatly you may do your

surgery, I do not consider it good practice to operate without proper indications.

I would like very much to discuss this aspect of your practice with you since I think we all owe the public assurance of their receiving the highest grade of neurosurgical care. I have discussed this with Dr. Collis and Dr. Gildenberg, since both of them have independently formed similar opinions concerning your surgical indications.

Sincerely yours,

/s/ DONALD F. DOHN
Donald F. Dohn, M.D.

P.S. Another case in point is that of Mrs. Duprey. You sent me copies of the operative note, but again in neither note do you describe what your findings were. I personally do not see how one can complete an operative note without describing the pathology or lack of the pathology. DFD